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January 11, 1993

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By Hand Delivery

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
Room 522  
1919 M Street, N.W.  
Washington, DC 20554

Re: CC Docket No. 92-77, Phase I  
*In the Matter of Billed Party Preference for 0+ InterLATA Calls*

Dear Ms. Searcy:

Transmitted herewith for filing on behalf of LDDS Communications, Inc. are an original and five (5) copies of its petition for reconsideration of the Commission's Report and Order and Request for Supplemental Comment issued in this proceeding.

If there are any questions, please communicate directly with the undersigned.

Sincerely yours,

  
Mitchell F. Brecher

Enclosure

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Before the  
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Washington, D.C. 20554

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In the Matter of

Billed Party Preference  
for 0+ InterLATA Calls

CC Docket No. 92-77  
Phase I

PETITION FOR RECONSIDERATION OF  
LDDS COMMUNICATIONS, INC.

LDDS COMMUNICATIONS, INC.

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## SUMMARY

LDDS Communications, Inc. asks the Commission to reconsider its CIID Card Decision wherein it declined to adopt its 0+ Public Domain proposal to govern calling cards issued by interexchange carriers, specifically, AT&T, in the Card Issuer Identifier (CIID) format. By declining to require that calling cards issued in that format be allowed to be validated by all other carriers and by permitting those cards to continue to be accepted only by selected IXC's used with 0+ dialing, the Commission is permitting AT&T to exploit its remaining market power in the operator services market. The Commission's failure to adopt rules governing AT&T's validation activities will continue to cause consumers to experience frustration and inconvenience in their efforts to place operator-assisted calls from public phones.

The consumer confusion and competitive damage occasioned by CIID cards has been exacerbated by AT&T's own misleading and confusing card distribution practices and dialing information, as noted in a recent Commission admonishment letter. Yet, under the "wrist slap" consumer education remedy ordered by the Commission in lieu of 0+ Public Domain, AT&T will continue to enjoy the benefit of its wrongful behavior.

In rejecting the 0+ Public Domain proposal, the Commission disregarded the fact that the so-called "proprietary" CIID cards are not truly proprietary. Rather, they are shared with many carriers, including all of the local exchange carriers as well as several interexchange carriers chosen by AT&T. The Commission's refusal to impose any obligations on IXC issuers of such calling cards under either Title I or Title II of the Communications Act is facially inconsistent with its recent decision in Docket No. 91-115. There, it determined that the same calling card validation access, when provided by LECs, is subject to regulation under Title I as "incidental" to communications service, and under Title II, as a common carrier service. The Commission's Title I and Title II analyses of LEC validation access are equally applicable to the same services provided by IXC's which, like the LECs, are communications common carriers. The Commission failed to

consider this jurisdictional basis for action, despite being urged to do so by several IXC's and by two LEC's.

Finally, the Commission's customer education requirements will not remedy either the consumer inconvenience or the competitive damage which have resulted from AT&T's CIID card distribution practices and dialing instructions.

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PETITION FOR RECONSIDERATION OF  
LDDS COMMUNICATIONS, INC.

LDDS Communications, Inc. ("LDDS"), by its attorneys, hereby petitions for reconsideration of the Commission's Report and Order and Request for Supplemental Comment issued in this proceeding.<sup>1</sup> In support thereof, LDDS states as follows:

I. INTRODUCTION

In May 1992, the Commission issued a notice of proposed rulemaking in this proceeding in which it proposed a system of billed party preference as a routing methodology for operator-assisted (often called "0+") interexchange calls.<sup>2</sup> In addition, it proposed and sought comment on a plan designed to ameliorate the anticompetitive consequences that had resulted from distribution by the American Telephone and Telegraph Company ("AT&T") of millions of so-called "proprietary" calling cards in the Card Issuer Identifier ("CIID") format usable on a 0+ dialing basis. Under the Commission's proposal, interexchange carriers issuing calling cards in proprietary formats either would be required to allow other carriers to access the card account validation data bases, or those cards could only be used to charge calls originated on an access code dialing basis. Because, under this proposal, all calling card calls initiated by dialing 0+ could

<sup>1</sup> Billed Party Preference for 0+ InterLATA Calls (Report and Order and Request for Supplemental Comment), FCC 92-465, released November 6, 1992 (hereinafter "CIID Card Decision").

<sup>2</sup> Billed Party Preference for 0+ InterLATA Calls (Notice of Proposed Rulemaking), 7 FCC Rcd 3027 (1992) (hereinafter, "BPP Notice").

be validated and completed by any carrier, the proposal has become known as "0+ Public Domain."

Unfortunately, the Commission declined to adopt that proposal notwithstanding its own express recognition that AT&T's CIID card practices had created an immediate competitive problem<sup>3</sup>, and despite the existence of substantial record evidence that adoption of a policy like 0+ Public Domain was necessary to prevent remonopolization by AT&T of the operator services market. Instead, it adopted what it calls an "aggressive education" approach.<sup>4</sup> Specifically, it directed AT&T to: (1) educate CIID card holders to check payphone signage and to use 0+ access only at phones identified as being presubscribed to AT&T; (2) provide clear and accurate access code dialing instructions on every proprietary card issued; and (3) make its 800 Service access code easier to use.<sup>5</sup> However well-intentioned that "aggressive education" approach may be, it will neither end the consumer confusion and frustration nor eliminate the damage to the competitive market for operator-assisted services which already have resulted from AT&T's CIID card activities and which continue to result from those activities. Accordingly, LDDS, which supported the Commission's 0+ Public Domain proposal,<sup>6</sup> hereby requests that the Commission reconsider its decision not to adopt that proposal.

**II. BY FAILING TO ADOPT ITS 0+ PUBLIC DOMAIN PROPOSAL,  
THE COMMISSION IS PERMITTING AT&T TO ENJOY THE BENEFITS  
OF ITS OWN WRONGFUL BEHAVIOR**

Prior to commencement of this proceeding, AT&T had distributed approximately twenty-five million CIID cards to holders of line number-based calling cards. Moreover, AT&T accompanied the distribution of those cards with materials containing confusing and misleading

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<sup>3</sup> CIID Card Decision, *supra*, at ¶ 25.

<sup>4</sup> *Id.* at ¶ 63.

<sup>5</sup> *Id.* at ¶ 57.

<sup>6</sup> *See* Comments of LDDS Communications, Inc. filed June 2, 1992 and Comments of Advanced Telecommunications Corporation, AmeriCall Systems, Inc. and First Phone of New England, Inc., also filed June 2, 1992. In December 1992, LDDS and Advanced Telecommunications Corporation merged.

statements about non-existent government regulations compelling the distribution of those cards, and instructions to cardholders to destroy their existing line number-based cards -- cards which, unlike CIID cards, could be used in connection with the services of many carriers. AT&T also instructed CIID card recipients to utilize those cards on a 0+ basis from all telephones, whether or not such phones were presubscribed to AT&T. Finding AT&T's explanation for this conduct to be "seriously lacking," the Commission admonished AT&T for its CIID card marketing practices, directed it to take remedial steps to provide corrective information to consumers, and directed it to take actions to ensure that such behavior is not repeated.<sup>7</sup>

Despite that admonishment, AT&T is continuing to benefit from the very conduct which gave rise to that admonishment, and consumers as well as competitors are continuing to suffer the adverse consequences of that conduct. Irrespective what information AT&T may be asked to place on future calling cards, or what instructions might accompany such cards, the uncontroverted fact remains that many millions of CIID cards already have been distributed to consumers with directions to destroy their old cards and with instructions to use 0+ access to place calls, without regard to who might be the presubscribed carrier serving the originating telephone.<sup>8</sup> As a result, today, LDDS and other companies that provide operator-assisted services in competition with AT&T are unable to complete millions of calls originated on a 0+ dialing basis from telephones where they are the presubscribed carrier. The Commission has expressly recognized that

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<sup>7</sup> Letter to Mr. Robert E. Allen, Chairman and Chief Executive Officer, AT&T, from Donna R. Searcy, Secretary, By Direction of the Commission, FCC 92-490, released November 16, 1992.

<sup>8</sup> The Commission claims that the competitive problems caused by 0+ proprietary calling cards were raised before the Commission as early as April 1991. CIID Card Decision, *supra*, at ¶ 1 n.1. In fact, the issues surrounding proprietary calling cards and 0+ access have been before the Commission even longer. They were raised as long ago as the Cincinnati Bell proceeding. See Cincinnati Bell Telephone Company, 4 FCC Rcd 5033 (1989). In May 1990, in that proceeding, MCI urged the Commission to require AT&T to use proprietary access methods (e.g., 1-800) for its so-called "proprietary" calling cards. Supplemental Comments of MCI Telecommunications Corporation, filed March 16, 1990. By not addressing those issues until October 1992, AT&T has been afforded ample time to distribute CIID cards to virtually the entire base of customers holding line number-based or Regional Accounting Office-based cards.



consumers and AT&T's competitors are the victims of AT&T's CIID card practices. As the Commission stated:

Customers are understandably frustrated when their calls, placed in accordance with the dialing instructions AT&T provides for its CIID cards, cannot be completed as dialed. AT&T's competitors' inability to process CIID card calls has caused this customer frustration to be misdirected at the OSP. It may be then be communicated to the aggregators, and result in a loss of customer good will for the OSP.<sup>9</sup>

All of that aforementioned consumer frustration and loss of good will could have been avoided if AT&T had not implemented its CIID card migration strategy by use of such confusing and misleading tactics and had it not instructed millions of callers to attempt to initiate 0+ calls from phones where it is not the presubscribed carrier. AT&T's CIID card strategy was solely its business decision. It made no effort to implement that decision in a manner which included clear and accurate instructions to consumers. Yet, by affording CIID cards proprietary status and allowing their continued use on a 0+ basis, the Commission is enabling AT&T to derive all of the intended competitive benefits of that strategy.

As between the entity whose wrongful conduct has caused the consumer confusion and competitive damage noted in the CIID Card Decision, and the victims of that conduct -- consumers and competitors, equity and common sense counsel that any Commission-imposed remedy place the onus on the wrongdoer, not on the victims. However, the Commission's adoption of its so-called "education" remedy in lieu of its 0+ Public Domain proposal constitutes little more than a "wrist slap" to AT&T. None of the remedial steps ordered by the Commission are likely to impede AT&T's ability to continue to exploit its market power in the operator services market by reducing the volumes of commissionable traffic reaching the networks of presubscribed carriers.<sup>10</sup> Even after those steps are fully implemented, many millions of calling cardholders will have already

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<sup>9</sup> CIID Card Decision, *supra*, at ¶ 25.

<sup>10</sup> As recently as August 1991, the Commission recognized that AT&T retains market power in the provision of operator services. Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5907 (1991).

replaced their line number-based cards with CIID cards which will prevent them from using the services of any carriers except AT&T and those carriers with whom AT&T has chosen to allow access to its CIID card data base. Further, those millions of cardholder callers will soon learn that their CIID cards can still be used to place 0+ calls and are likely to continue to use those cards in that manner from telephones without regard to whether or not AT&T is the presubscribed carrier. They will do so notwithstanding the mailing of subsequent dialing instructions which contradict the instructions already on the cards in the customers' pockets and purses. In short, there is no reason to expect that the relief ordered by the Commission in the CIID Card Decision will remedy the damage occasioned by AT&T's calling card distribution practices and usage instructions.

### III. THE CIID CARD DECISION DISREGARDS EVIDENCE THAT CIID CARDS ARE NOT TRULY PROPRIETARY

Underlying the Commission's rejection of its own 0+ Public Domain proposal is the notion that proprietary calling cards serve the public interest. As the Commission stated, "IXC proprietary calling cards are one way to serve the important public interest of permitting consumer choice in the presubscription environment."<sup>11</sup> LDDS has no quarrel with the Commission's view that proprietary calling cards create public interest benefits, including consumer choice. Indeed, LDDS issues proprietary calling cards to its customers. Unlike LDDS's cards, AT&T's CIID cards are not truly proprietary cards. Those cards are not limited to the services of the card-issuing carrier. Rather, as the Commission has noted, AT&T permits many carriers -- local exchange carriers as well as selected other IXCs -- to accept those cards and to access its CIID card data base.<sup>12</sup> In fact, AT&T's so-called "proprietary" calling card may be validated by virtually any company that jointly provided long distance telephone service with AT&T prior to divestiture. Since the entire pre-divestiture long distance "partnership" has access to that data base, the cards are not proprietary cards; they are "integrated monopoly" cards. By permitting its former partners to accept its calling cards for some calls (e.g., intraLATA calls dialed on a 0+ basis rather than a

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<sup>11</sup> Id. at ¶ 21.

<sup>12</sup> Id. at ¶ 47 n. 80.

10XXX+0 basis) while limiting access to the validation data base to itself and favored IXC's for other calls (e.g., interLATA calls except for those carried by companies like GTE Airfone and Alascom), these so-called "proprietary" calling cards are effectively dividing the long distance operator-assisted calling market between AT&T and its former LEC partners in much the same manner as it was prior to divestiture. In addition, AT&T now permits Stentor, a Canadian IXC, to validate calls charged to AT&T CIID cards.

Once the issuer of calling cards allows some other carriers to validate its data base, it can no longer claim the cards or the data base used to validate those cards to be proprietary. By permitting every LEC in the nation as well as several selected IXC's to validate its CIID cards, AT&T indeed has placed those cards in the public domain. Having already made that data base available to many other carriers, including some of its competitors, the calling cards and the data base no longer are proprietary.<sup>13</sup> Yet, the Commission's CIID Card Decision fails to recognize the nonproprietary nature of those cards. Indeed, the Commission endorsed this discrimination, noting enthusiastically how "[CIID cardholders] will be assured of being served only by the carrier of their choice or by a carrier with whom that IXC chooses to enter into a business relationship."<sup>14</sup> LDDS is disturbed by this rationalization. This discriminatory AT&T practice condoned by the Commission was once tolerated when practiced by certain LECs, which steadfastly refused to share validation with any IXC except their former long distance partner, AT&T, the only IXC with whom they chose to have such a relationship. That discriminatory behavior was found by the Commission to be violative of the Communications Act. Such behavior, outrageous in retrospect, is no less so, when practiced by AT&T.

As part of its rationale for rejecting its own 0+ Public Domain proposal, the Commission quoted AT&T's "unequivocal" position that, if given a choice between shared access and keeping

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<sup>13</sup> Many of the independent LECs which AT&T allows to access its CIID card data base are also involved in the long distance business and are not prohibited from providing interLATA as well as intraLATA toll services (e.g., Cincinnati Bell, United Telephone, San Marcos Telephone Company).

<sup>14</sup> CIID Card Decision, *supra*, at ¶ 47.

its CIID card data base proprietary, it would choose the latter.<sup>15</sup> According to the Commission, this would necessitate twenty-five million CIID card holders having to dial access codes to place calls.<sup>16</sup> What AT&T's threat ignores and what the Commission ignores in acceding to that threat is that AT&T already permits shared access to its CIID card data base and that therefore that data base should no longer be considered to be proprietary.

In addition, the Commission continues to disregard the fact that the means of access used to originate calls charged to AT&T CIID card is not a proprietary access arrangement. Unlike each of its card-issuing IXC competitors (e.g., LDDS, MCI and U S Sprint) which never have directed consumers to access their services on other than a proprietary access code dialing basis, AT&T has only recently completed a massive campaign of instructing holders of its purportedly proprietary cards (all twenty-five million of them) to dial 0+ from any phone. Any remaining legitimacy to AT&T's claim that its CIID cards (shared with hundreds of other carriers) are entitled to "proprietary" status dissipates as a result of AT&T's successful efforts to make 0+ from all public telephones the paramount means of access for calls charged to those cards.

#### IV. NONE OF THE COMMISSION'S STATED REASONS FOR REJECTION OF 0+ PUBLIC DOMAIN WITHSTAND ANALYSIS

At paragraph 20 of the CIID Card Decision, the Commission lists three reasons in support of its rejection of its 0+ Public Domain proposal. First, it asserts that the costs of that proposal outweigh the benefits. Second, it notes that it is considering billed party preference as a long term solution. Finally, it states that the impending unblocking of 10XXX access codes at aggregator locations will decrease the importance of public telephone presubscription. None of these stated reasons justify the Commission's failure to mandate a 0+ Public Domain policy.

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<sup>15</sup> Id. at ¶ 45.

<sup>16</sup> Id.

### *A. The Costs Do Not Outweigh the Benefits*

According to the Commission, the most important “cost” of 0+ Public Domain is “customer inconvenience.”<sup>17</sup> Specifically, it alleges that AT&T’s CIID card customers would have to dial access codes to reach AT&T.<sup>18</sup> This is incorrect. AT&T could continue to utilize 0+ dialing as its primary access method, so long as AT&T adopts an evenhanded, nondiscriminatory validation policy. Such a policy would not require AT&T to make its validation data base available to LDDS provided that it did not make that data base available to any other carrier. Thus, whether or not AT&T cardholders would have to dial such codes would depend, not upon the Commission, but upon AT&T itself. AT&T would have the Commission believe that massive inconvenience would result if LECs were unable to accept and validate AT&T CIID cards. In fact, little, if any, confusion would occur. First, AT&T CIID cardholders could continue to use 10XXX+0 access to route many intraLATA calls to AT&T. AT&T has pursued and is pursuing intraLATA authority to carry such calls from state utility commissions. In addition, AT&T CIID cardholders retain the option of replacing their CIID cards with line number-based or Regional Accounting Office number-based cards provided by LECs. Indeed, LDDS suspects that many CIID cardholders would still be using previously-issued LEC calling cards which those cardholders destroyed when directed to do so by AT&T.

Furthermore, the “costs” of that customer convenience pale in comparison with the customer inconvenience already being experienced. Today, millions of CIID card calls cannot be completed at all without some form of transfer by the presubscribed carrier to AT&T. Whether these transfers involve dialing instructions, call reorigination through the originating LEC, or transfer at or near the location of the presubscribed IXC (i.e, call “splashing”), such transfers inconvenience, frustrate and waste the time of millions of consumers daily. These costs could be avoided if those consumers were able to have their 0+ calls completed by the carrier serving the

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<sup>17</sup> *Id.* at ¶ 45.

<sup>18</sup> *Id.*

originating telephone or if those consumers had been sent confusing and misleading information by the card-issuing carrier about the "capabilities" of their calling cards.

*B. Speculation About Billed Party Preference is Premature*

Throughout the CIID Card Decision, the Commission repeatedly suggests that the consumer and competitive problems associated with proprietary calling cards will disappear upon implementation of billed party preference which the Commission views as a long term solution.<sup>19</sup> That optimism about billed party preference disregards the record before the Commission in Phase II of this proceeding. The comments filed on the billed party preference proposal indicate that it will be extremely costly -- in excess of one billion dollars to implement, that it would create significant cost recovery problems, that it would not work for many categories of operator-assisted calling, and that it could not be ubiquitously implemented for many years -- possibly more than a decade. To the degree that the Commission's rejection of its 0+ Public Domain proposal is based on an expectation about the near term availability of billed party preference, that expectation is misplaced. No matter what the Commission decides in Phase II, the competitive inequity and consumer confusion, frustration and inconvenience resulting from the distribution of twenty-five million CIID cards with 0+ dialing instructions will continue to exist for many more years. The uncertain possibility that billed party preference might someday be implemented furnishes no justification for the Commission's failure to resolve the calling card issues before it in Phase I of this docket.

*C. 10XXX Unblocking is Irrelevant to the Need for 0+ Public Domain.*

The Commission states that the required phased-in unblocking of 10XXX access codes will ultimately decrease the competitive importance of presubscription, because all IXC card customers will enjoy roughly the same ability to dial around the presubscribed carrier to reach their

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<sup>19</sup> CIID Card Decision, *supra*, at ¶¶ 1, 2, 6, 20, 28 n.47, 31, 42, 44, 45, and 65. See also Separate Statements of Commissioners Barrett and Duggan.

carrier of choice.<sup>20</sup> Reliance on 10XXX unblocking as obviating the need for 0+ public domain in misplaced. Even without 10XXX unblocking, every IXC -- including AT&T -- is today required to make available either a 950 or 1-800 access code for customers to reach it from telephones presubscribed to other IXCs. In other words, dial around access already is ubiquitously available. Still, many consumers tend to use 0+ dialing, especially when they have been instructed to do so by their card-issuing carrier. There is no basis for concluding, as the Commission does in the CIID Card Decision, that the impending availability of 10XXX access will have any impact on public telephone presubscription. In fact, LEC public telephones, which constitute the largest number of aggregator locations, already allow 10XXX access. Yet the competition among IXCs to serve those phones on a presubscribed basis is intense.<sup>21</sup> Finally, as discussed in Section V of this petition, infra, the issue of 10XXX unblocking -- indeed, the issue of dialing patterns generally -- is separate from the issue of whether AT&T has Title I or Title II obligations with respect to access to its calling card validation data base.

V. THE COMMISSION'S REFUSAL TO REQUIRE  
NONDISCRIMINATORY ACCESS TO IXC CALLING CARD  
VALIDATION DATA IS INCONSISTENT WITH ITS EARLIER  
DECISION REGARDING ACCESS TO LEC VALIDATION DATA

Only six months prior to its CIID Card Decision, the Commission concluded in Docket No. 91-115 that access to LEC validation data is both a communications service and a common carrier service, and that, as such, access to LEC validation data must be made available on a

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<sup>20</sup> Id. at ¶ 20.

<sup>21</sup> In addition to the reasons listed at paragraph 20 for abandoning its 0+ Public Domain proposal, the Commission cites as another reason that AT&T cardholders have made their carrier choice before reaching the telephones, as evidenced by their use of their AT&T CIID card. CIID Card Decision, supra at ¶ 48. This assertion completely disregards the circumstances surrounding those customers' obtainment of their CIID cards. As the Commission itself recognized, both in the CIID Card Decision and in the November 16, 1992 letter of admonishment, consumers had CIID cards foisted upon them by misleading and confusing information. Many cardholders do not take their CIID cards to public telephones because they want to use AT&T. They do so because they have been instructed by AT&T to destroy their existing cards and because they have been incorrectly told that government regulations required that they receive the CIID cards as replacements for their calling cards. In view of these circumstances, the Commission's assertion that use of CIID cards constitutes conscious selection of AT&T by callers is unsupported and unsupportable.

nondiscriminatory basis to all IXCs.<sup>22</sup> That docket focused on LEC validation obligations because LEC misbehavior had precipitated that investigation. However, like access to LEC validation data, access to IXC validation data for 0+ calling cards is both communication service and common carrier service. Whatever differences might exist between LECs and IXCs, those differences are not relevant to the Commission's analysis of 0+ calling card validation data access under Title I and Title II of the Communications Act. Indeed, it is the functional equivalency of those services which forms the jurisdictional basis for the Commission action needed upon reconsideration.

In concluding that LEC validation is subject to the Commission's jurisdiction under Title I and Title II of the Communications Act, the Commission considered two threshold questions: 1) Whether the activity is an interstate or foreign communications service; and 2) whether the entity providing the service is offering it as a common carrier.<sup>23</sup> The Commission answered both questions in the affirmative. In determining LEC validation to be communication service, the Commission stated that it is "incidental" to the LECs' provision of local exchange service and is therefore "communication by wire" within the meaning of Section 3(a) of the Act (47 U.S.C. § 153(a) 1991).<sup>24</sup> The Commission characterized the LEC validation data bases as "repositories of information that the LECs necessarily obtain in the course of doing business as local exchange providers."<sup>25</sup>

Just as LECs' data bases consist of information obtained in the course of doing business as LECs, IXC validation data bases consist of information obtained by them in the course of offering interexchange services. Indeed, CIID numbers, like LEC-assigned line numbers and Regional Accounting Office ("RAO") numbers, are components of the North American Numbering Plan and are used to ascertain the nature of the subscriber's service. Like CIID card numbers, LEC calling

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<sup>22</sup> Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards (Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528 (1992) (hereinafter, "Validation Order").

<sup>23</sup> Id. at 3531.

<sup>24</sup> Id.

<sup>25</sup> Id.



card numbers may or may not be related to specific working telephone numbers. In fact, one need not order local exchange telephone service from a LEC to receive a calling card from that LEC. Similarly, one can become a calling card customer of AT&T without subscribing to any other interexchange service from that card-issuing carrier. For example, an AT&T Universal Card customer need not presubscribe to AT&T's long distance service. The Communications Act in general, and Section 3(a) in particular, do not distinguish between local exchange and interexchange service. Accordingly, access to a communications service provider's validation data base used for 0+ calls is subject to Title I as incidental to the provider's communications service, whether the common carrier providing that service as part of its communication service is a LEC or an IXC. Access to IXC validation data bases is every bit as incidental to communication service as is access to LEC validation data bases.

As for the second question in the Commission's LEC validation analysis, IXC validation also is common carrier service under Section 3(h) of the Act (47 U.S.C. § 153(h) (1991)). In the Validation Order, the Commission applied the test for common carriage set forth by the United States Court of Appeals in NARUC v. FCC, 525 F. 2d 630 (D.C. Cir.), cert. den. 425 U.S. 999 (1976) (NARUC I). In NARUC I, the court adopted the "holding out" test for common carriage (an entity is a common carrier for a particular service if it is under a legal compulsion to hold itself out or if it does so without legal compulsion). Applying that test, the Commission concluded that LEC validation is common carriage, stating as follows:

If a service provider does or will possess market power because of a shortage of alternative suppliers or capacity or because customers lack the ability or interest to represent themselves adequately in dealings with the service provider, we will require the provider of a communications service to hold itself out indiscriminately to the public on a common carrier basis.<sup>26</sup>

With respect to validation of AT&T CIID card account numbers, unquestionably there is such a "shortage of alternate suppliers or capacity." In fact, there are no other suppliers. For

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<sup>26</sup> Id. at 3532, citing Norlight, 2 FCC Rcd 132, 134 (1987).

LDDS and other IXC's which provide 0+ services from public telephones, there is no other supplier of validation service and billing information for the calls that are to be charged to the twenty-five million CIID cards in circulation being used to place 0+ calls in accordance with the card issuer's original card usage instructions. Just as the Commission concluded that IXC access to LEC validation data is necessary to enable IXC's to provide interstate services, especially operator services,<sup>27</sup> so too is access to IXC validation data necessary to enable other IXC's to provide those same interstate services. Simply stated, there is no basis for concluding that access to the calling card data base of a dominant interexchange carrier is any less common carrier service or communications by wire than is access to LEC validation bases. The services are indistinguishable. Assuming arguendo, that AT&T is under no legal compulsion as a common carrier to allow access to its CIID card validation data base to any LEC, GTE Airfone, Alascom, Stentor, or any other carrier, once it allowed validation access to those carriers, AT&T, under the NARUC I test, as applied by the Commission, was holding itself out to provide a service over which it possesses market power.<sup>28</sup> Therefore, AT&T's provision of validation access service, like the LEC's validation access service, has all of the legal characteristics of a communications common carrier service and must be made available subject to rates and conditions that are just and reasonable and nondiscriminatory.

Many commenters described the equivalency of AT&T and LEC validation obligations and asserted that CIID card validation access, like LEC calling card validation data, is subject to the Commission's Title I and Title II jurisdiction. Those commenters included Advanced Telecommunications Corporation, Value Added Communications, BellSouth and Pacific Bell. Yet, those jurisdictional arguments were wholly ignored by the Commission in the CIID Card Decision.

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<sup>27</sup> Id.

<sup>28</sup> Like AT&T, LECs are under no legal obligation to issue 0+ calling cards. However, if they do issue such calling cards and afford access to the card validation data bases to any carriers, Title II's nondiscrimination requirements become applicable.

**VI. THE COMMISSION'S CUSTOMER EDUCATION REQUIREMENTS  
WILL NOT REMEDY THE CONSUMER INCONVENIENCE  
OR COMPETITIVE PROBLEMS WHICH HAVE ALREADY RESULTED  
FROM UNRESTRAINED PROLIFERATION OF "PROPRIETARY"  
IXC CALLING CARDS USABLE WITH 0+ ACCESS**

In rejecting its own 0+ Public Domain proposal in favor of imposition of consumer education requirements on AT&T, the Commission concluded largely without explanation that consumer education is the remedy that best balances the interests of CIID card holders, AT&T's competitors and AT&T.<sup>29</sup> That conclusion defies facts known to the Commission as well as common sense.

By assuming that education will cause customers to check payphone signage and to use 0+ access only at phones presubscribed to AT&T, the Commission ignores history and its own knowledge of telephones at aggregator locations. This is not the first time that customer education has been attempted as a means to modify consumer behavior regarding telephone service. When the Bell Operating Companies began to convert their end offices to equal access following divestiture in 1984, customer education was a major aspect of the BOCs' presubscription efforts. The BOCs expended considerable effort attempting to "educate" consumers about their opportunity to presubscribe to the service of the long distance carrier of their choice. In addition to the education efforts of the BOCs which consisted of mass mailings and bill inserts as well as print and broadcast media advertising, IXCs themselves aggressively marketed their services in efforts to persuade consumers to sign up for their services. Consumers who ignored those educational efforts remained assigned to AT&T by default.

The result of those education efforts was that the vast majority of consumers did nothing and were "defaulted" to AT&T. The Commission, recognizing that the combination of customer education and default were insufficient to motivate consumers to participate in the presubscription process, determined that those practices were unreasonable and discriminatory in violation of

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<sup>29</sup> CIID Card Order, *supra*, at ¶ 55.

Sections 201(b) and 202(a) of the Act (47 U.S.C. § § 201(b) and 202(a)).<sup>30</sup> It then ordered the BOCs (and other LECs converting to equal access) to implement a system of balloting and allocation. Rather than educating consumers to choose a long distance carrier, the Commission ordered a system which required consumers either to select carriers or to have their presubscribed carriers selected for them. Consumer education was determined by the Commission to be insufficient to change customer behavior regarding the selection of presubscribed IXCs. Similarly, there is no basis to support the Commission's conclusion in this proceeding that customer education will be sufficient to change twenty-five million CIID card holders' dialing practices. This is especially true since 0+ calling will be required, even if the originating telephone is not presubscribed to AT&T, if the cardholder is attempting to place an intraLATA call.

Recently, the Commission promulgated rules obligating telephone aggregators to provide signs at their telephones identifying the presubscribed IXC providing operator services at the phones.<sup>31</sup> Although that information is required to be posted, the Commission is aware that many aggregators are not yet in compliance with those requirements. More importantly, LDDS questions whether AT&T has adequate control over the accuracy of payphone signage or over the degree of compliance by aggregators. Even if AT&T is able to educate consumers to check regularly the signage at public phones, that signage will not always be accurate and, in many instances, there will be no signage at all.

The second part of AT&T's customer education requirement, i.e., to provide clear and accurate access code dialing instructions on every proprietary card issued, also is unlikely to have a significant impact on CIID card holder dialing behavior in the near term. Virtually all of AT&T's embedded base of cardholders received their CIID cards without the newly-required dialing instructions prior to issuance of the CIID Card Decision. The Commission has not required that those cards be recalled by AT&T and reissued with correct dialing instructions. Even if all future

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30 Investigation of Access and Divestiture Related Tariffs, 101 FCC2d 911, 920 (1985).

31 See Section 64.703(b) of the Commission's Rules, 47 C.F.R. § 64.703(b).

CIID cards are issued with dialing instructions in accordance with the Commission's directive, the vast majority of card holders will not be affected. Perhaps AT&T will send its existing cardholders corrective advertising or perhaps even stickers to affix to the back of their cards. Neither AT&T nor the Commission have any ability to ensure that those cardholders will even read those instructions, let alone attach them to their cards. Thus, there is no basis for the Commission to conclude that the customer education requirements imposed on AT&T will have any significant impact on CIID card holder calling procedures.

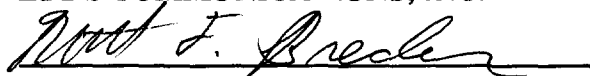
## VII. CONCLUSION

The Commission's failure to comprehensively address AT&T's discriminatory calling card validation practices cannot be harmonized with the Communications Act or with the Commission's conclusions about common carrier validation obligations in Docket No. 91-115. Its attempt at compromise, as reflected in the CIID Card Decision, will not remedy the adverse consequences of AT&T's CIID card distribution activities and its CIID card dialing instructions, either on consumers of telecommunications services or upon competitive providers of those services.

For all of the reasons set forth in this petition for reconsideration as well as those enumerated in the comments filed in this proceeding filed by LDDS Communications, Inc. and by Advanced Telecommunications Corporation, AmeriCall Systems, Inc., and First Phone of New England, Inc., LDDS respectfully urges the Commission to reconsider its CIID Card Decision in accordance with the views expressed herein.

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January 11, 1993

CERTIFICATE OF SERVICE

I, Raina N. Price-Webster, do hereby certify that a copy of the attached petition for reconsideration of the Commission's Report and Order and Request for Supplemental Comment for PhoneTel Technologies, Inc., which was filed with the Federal Communications Commission on January 11, 1993, has been served via first-class mail, postage pre-paid to the recipients on the attached pages.

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